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OFFICE OF PETITIONS

In re Application of :
Bedell, et al. :
Application No. 09/883,502 : ON PETITION
Filed: June 19, 2001 :
Attorney Docket No. 53470.003037 :
For: REPORT SYSTEM AND METHOD
USING PROMPT OBJECTS

This is a decision on the petition under 37 CFR 1.137(a), filed November 6, 2006, to revive the above-identified application. In addition, the petition will be treated under 37 CFR 1.181 as a petition to withdraw the holding of abandonment of the above-identified application because petitioner alleges that Office error was the cause of abandonment.

The petition under 37 CFR 1.181 **DISMISSED**.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

This application was held abandoned due to applicants' alleged failure to properly reply within three months to the non-final Office action, mailed December 30, 2005. A review of the application file reveals that a request for a two month extension of time and a Notice of Appeal were filed on May 30, 2006. However these documents were directed to application no. 09/883,303. The Office contended that this application became abandoned on May 31, 2006 for failure to file a proper follow-up submission to the May 30, 2006 Notice of Appeal. A Notice of Abandonment was mailed on October 31, 2006.

Petitioners assert that an amendment was timely received in the Office on May 30, 2006. In support of this assertion, petitioners have provided a copy of applicants' EFS Acknowledgement Receipt showing that the Office received a DOC.PDF with a file size of 106227 bytes and a fee-

info.pdf with a file size of 8139 bytes. While it is true that applicants indexed the 106227 byte file as an amendment after non-final rejection, a review of the 106227 byte document in the official file shows that it is a Notice of Appeal and Petition for a Two Month Extension of Time. The size of the document submitted via EFS (106227 bytes) is the same as what is shown on the acknowledgement receipt, showing that what applicants actually submitted (i.e., Notice of Appeal and Petition for Two Month Extension of Time) is what the Office received.

Accordingly, the petition under 37 CFR 1.181 is dismissed. The application did become abandoned.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l);¹ (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

Regarding (3) above, petitioners have not shown to the satisfaction of the Director that the entire delay from the due date of the reply to the filing of a grantable petition was unavoidable.

The Director may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word unavoidable ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his

¹ Pursuant to petitioners' authorization, deposit account no. 50-0206 will be charged the required \$500.00 petition fee.

or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

Petitioners did not act as prudent and careful men in relation to their most important business when they failed to file the May 30, 2006 amendment in this application. The petition under 37 CFR 1.137(a) is **dismissed**.

Petitioners are strongly encouraged to file a petition to revive under the unintentional standard of 37 CFR 1.137(b). The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if a petitioner intentionally delays the filing of a petition for revival under 37 CFR 1.137(b).


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